Supreme U.S.
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No. 00-519

IN THE
SUPREME COURT OF THE UNITED STATES

SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY,
COMMISSIONER OF NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES, AND
ATTORNEY GENERAL OF NEW YORK,

Cross-Petitioners,

v.

MARTIN H. TANKLEFF,

Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Following denial of his application for a writ of habeas corpus, Marty Tankleff submitted a motion for a "certificate of appealability" to the United States District Court for the Eastern District of New York. *See* Motion for Certificate of Appealability, filed February 12, 1997.[1] The memorandum in support of the motion and the draft order accompanying it specified four issues for which the certificate was sought, including the *Miranda* issue, and specifically requested certification with respect to "each of the issues." Memorandum of Points and Authorities at 7, Draft Order at 1. In a Memorandum and Order specifically discussing all four issues, including the *Miranda* issue, the District Court held that "defendant's motion for such a certificate is hereby, granted." *See* Cross-Pet. App. at 4a. The Order explicitly stated that it was "granting a certificate of appealability." *See id.*

Before the Second Circuit below, cross-petitioners argued that Marty had not satisfied the requirements for a certificate of appealability. The Second Circuit did not reach that question because it held that a certificate of appealability was not necessary when a habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. *See* Petitioner's main brief, No. 00-327 ("Pet.") App. at 8a-9a. The Second Circuit then evaluated Marty's appeal under the pre-existing "certificate of probable cause" caselaw established by this Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and found that his "claims clearly satisfy this standard." Pet. App. at 9a. Since this Court's decision last Term in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595 (2000), makes it clear that the same

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[1] The Cross-petition asserts that Marty requested a "certificate of probable cause." Cross-Petition ("Cross-Pet.") at 2. This is simply false.

substantive "*Barefoot*" standards apply under the AEDPA, the conditional cross-petition is much ado about nothing.

REASONS FOR DENYING THE WRIT

I.

THE CONDITIONAL CROSS-PETITION DOES NOT MERIT REVIEW

The conditional cross-petition fails to satisfy the considerations governing review on certiorari by this Court. In light of this Court's decision in *Slack*, the Second Circuit's holding that a certificate of appealability was unnecessary was concededly an error, albeit a clearly harmless error. But this Court does not sit to correct errors in individual cases, let alone harmless ones. *See* Supreme Court Rule 10.

Through its decision in *Slack*, this Court has already decided the federal question of law underlying cross-petitioners' argument. The subsequent application of *Slack* to the unique facts of an individual case hardly raises a "cert-worthy" issue.[2] At bottom, the Second Circuit did not literally apply the AEDPA to Marty's case based on a mistaken belief that it was not required to do so, but it then effectively did the same thing by applying the same substantive standards to the case. This scenario does not present any legal issue that is worth this Court's time and attention to resolve.

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[2] This is particularly true when the underlying decision, as here, was actually rendered before *Slack* was even decided and therefore self-evidently poses no direct challenge to its application.

II.

THE SECOND CIRCUIT PROPERLY CONSIDERED MARTY'S APPEAL

Although the Second Circuit held that a certificate of appealability was not required, there can be no genuine dispute that Marty in fact received a proper certificate of appealability under 28 U.S.C. § 2253(c)(2). The district court's order expressly stated that it granted a certificate of appealability, and it plainly complied with the statutory requirement that such a certificate "shall indicate which specific issue or issues satisfy the showing required." 28 U.S.C. § 2253(c)(3). As discussed above, the papers in support of the motion for a certificate of appealability specified four issues for which the certificate was sought. And the memorandum and order issued by the District Court discussed all four of those issues and "granted" the "defendant's motion for such a certificate." Cross-Pet. App. at 4a. The District Court obviously intended to and did certify each of the issues raised in Marty's application for a certificate of appealability.[3]

Moreover, the Second Circuit's ruling that the appeal was proper made clear that the district court's certificate satisfied the legal standard required for a certificate of appealability. As cross-petitioners concede in their brief, in order to obtain a certificate of appealability under this statute, and under *Slack*, the applicant must "make a substantial showing that he was denied a constitutional right . . . *[which] is the same standard which was used to evaluate the old certificate of*

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[3] Cross-petitioners' comments regarding 28 U.S.C. § 2254(d), *see* Cross-Pet. at 4, are not relevant to the validity of a certificate of appealability. That section pertains only to review of a habeas petition on the merits. In addition, § 2254(d) would not apply to Marty's case because his petition was filed on February 7, 1996, prior to the effective date of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

probable cause." Cross-Pet. at 3 (emphasis added). The Second Circuit below evaluated Marty's application under exactly this standard, holding that:

> Tankleff's claims clearly satisfy this standard: we have determined that Tankleff's *Batson* claim has substantial merit; the Appellate Division split three-to-two on both the *Miranda* question and the propriety of the prosecution's summation; and the district court thought that the *Brady* issue was a "close call." It follows that Tankleff's claims are all properly before this court.

Pet. App. at 9a-10a. Thus, although the Second Circuit used the wrong terminology ("certificate of probable cause" as opposed to "certificate of appealability"), its analysis of the issues made clear that Marty's appeal satisfied the correct substantive standard.

Further, the Second Circuit ultimately found on the merits that Marty had indeed been denied his *Miranda* rights by the Suffolk County detectives who interrogated him in this case. That Court also found that Marty had established a *prima facie* case that his *Batson* rights were violated in the state proceedings. These were the claimed violations of constitutional rights on which Marty actually prevailed in the Second Circuit. As a matter of logic, nothing further need be required to establish the legitimacy of his appeal to that Court.

Finally, even if there had been some technical deficiency in the certificate of appealability granted by the district court, the Second Circuit would have had the power to grant a certificate of appealability itself. *See Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997), *abrogated on other grounds sub nom., United States v. Perez*, 129 F.3d 255 (2d Cir. 1997). Thus, as Marty argued before the Second Circuit, if that court had any doubt as to which issues were certified

for appeal, it could itself have certified any or all of them. *See* Petitioner's Reply Brief at 2 n.2, filed May 28, 1997. Given the Second Circuit's statements regarding the existence of probable cause for appeal as well as its ultimate resolution of the appeal, there can be no question that the Court would indeed have issued such a certificate itself if it believed the case presented a need for it to do so. It is plain from the face of the Second Circuit's opinion below that it viewed all four issues to have met the standard of 28 U.S.C. § 2253(c)(2). *See* Pet. App. at 9a-10a (discussing why each of the four issues merits review under the identical standards from *Barefoot v. Estelle*). And there is no warrant for this Court to review that fact-bound determination.

In sum, the Second Circuit's only mistake was failing to anticipate this Court's holding in *Slack*. But if the Second Circuit had anticipated *Slack*, the outcome of this case would have remained the same, for Marty was clearly entitled to – and had in fact received – a proper certificate of appealability. Thus, even if the type of error-correction sought by the cross-petition were a proper use of this Court's certiorari jurisdiction, this would not be a proper case for exercising it, because correcting the error would not change the outcome. Regardless of *Slack*, the Second Circuit had jurisdiction to decide the *Miranda* issue, as does this Court.

CONCLUSION

The conditional cross-petition should be promptly denied.

Respectfully submitted.

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